

No. 10303

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

WASHINGTON BREWERS INSTITUTE, ET AL
Appellants.

vs.

UNITED STATES OF AMERICA,
Appellee,

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF FOR THE APPELLEE

CHARLES S. BURDELL
*Special Assistant to the
Attorney General*

JOHN S. HARLOW
ROBERT McFADDEN
ALLAN TRUMBULL
*Special Attorneys, Department
of Justice*

TOM C. CLARK
*Acting Assistant
Attorney General*

J. CHARLES DENNIS
United States Attorney

OFFICE AND POST OFFICE ADDRESS:
712 UNITED STATES COURT HOUSE,
SEATTLE, WASHINGTON

FILED

MAR 29 1943

No. 10303

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

WASHINGTON BREWERS INSTITUTE, ET AL
Appellants

vs.

UNITED STATES OF AMERICA,
Appellee,

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF FOR THE APPELLEE

CHARLES S. BURDELL
*Special Assistant to the
Attorney General*

JOHN S. HARLOW
ROBERT McFADDEN
ALLAN TRUMBULL
*Special Attorneys, Department
of Justice*

TOM C. CLARK
*Acting Assistant
Attorney General*

J. CHARLES DENNIS
United States Attorney

OFFICE AND POST OFFICE ADDRESS:
712 UNITED STATES COURT HOUSE,
SEATTLE, WASHINGTON

INDEX

	Page
STATEMENT	1
SUMMARY OF THE INDICTMENT.....	2
CONTENTIONS MADE BY APPELLANTS...	6
ARGUMENT:	
I. The Twenty-first Amendment does not deprive the United States of the power to regulate interstate commerce in intoxicating liquor when such commerce is carried on without violation of state laws	8
A. The United States Supreme Court and other federal courts affirm continuing federal authority over interstate commerce in liquor.....	8
B. Legislative history of the Twenty-first Amendment indicates intent to preserve federal authority over interstate commerce in liquor.....	16
II. The laws of the states of the Pacific Coast Area do not affect the applicability of the Sherman Act in the instant case	22
A. State legislation relating in a general way to liquor distribution does not divest the federal government of jurisdiction over interstate commerce in intoxicating liquors.....	22
B. Compliance with the Sherman Act in the distribution of beer in the Pacific Coast Area would not violate any law of any state in the Area..	28
III. The indictment sufficiently alleges a restraint which directly affects interstate commerce	33

	Page
IV. The indictment need not allege the absence of state laws which might be set up by way of defense.....	36
V. The indictment charges a violation of the Sherman Act and not simply a combination to comply with state laws....	38
VI. Count two of the indictment adequately alleges a violation of section three of the Sherman Act	39
CONCLUSION	41
CASES:	
<i>Adams Express Company v. Kentucky</i> , 238 U.S. 190	19, 33
<i>American Distilling Company v. Wisconsin Liquor Company</i> , 104 F. (2d) 582.....	10
<i>Arrow Distilleries, Inc. v. Alexander</i> , 109 F. (2d) 397	9, 23, 34
<i>Bacardi Corp. v. Domenech</i> , 311 U.S. 150....	26
<i>California State Brewers Institute, et al v. International Brotherhood of Teamsters, etc., et al.</i> (W.D. Wash., N. D. Equity No. 1184)	12, 13, 24
<i>Duckworth v. Arkansas</i> , 314 U.S. 390.....	15
<i>Dugan v. Bridges</i> , 116 F. Supp. 694.....	13, 19
<i>Joseph S. Finch & Co. v. McKittrick</i> , 305 U.S. 395	14
<i>Flippin v. United States</i> , 121 F. (2d) 742....	12
<i>Gregg v. United States</i> , 113 F. (2d) 687.....	12
<i>Hastings v. United States</i> , 115 F. (2d) 216..	12
<i>Hayes v. United States</i> , 112 F. (2d) 417..	10, 24, 26

CASES (Continued)

iii

Page

<i>Indianapolis Brewing Co. v. Liquor Control Commission</i> , 305 U.S. 391.....	14
<i>Wm. Jameson, Inc. v. Morgenthau</i> , 307 U.S. 171	10, 23, 25
<i>Keogh v. Chi. N. W. Ry.</i> , 260 U.S. 156.....	29
<i>Leisey v. Hardin</i> , 135 U.S. 100	18
<i>Local 167 v. United States</i> , 291 U.S. 293.....	36
<i>Mahoney v. Triner Corp.</i> , 305 U.S. 401.....	15
<i>Ogden v. Saunders</i> , 25 U.S. (12 Wheat.) 213..	16
<i>In re Rahrer</i> , 140 U.S. 545	35
<i>Rhodes v. Iowa</i> , 170 U.S. 412.....	35
<i>Sancho v. Corona Brewing Co.</i> , 89 F. (2d) 479	12, 26
<i>Schlitz Brewing Company v. Johnson</i> , 123 F. (2d) 1016	12, 13, 24
<i>State Board of Equalization v. Young's Market</i> , 299 U.S. 59	14
<i>Swift & Co. v. United States</i> , 196 U.S. 375..	31, 39
<i>United States v. Colorado Wholesale Wine and Liquor Dealers Association</i> , 47 F. Supp. 160	12, 13, 20, 23
<i>United States v. General Motors Corp.</i> , 121 F. (2d) 376	36
<i>United States v. Hill</i> , 248 U.S. 420.....	25, 34
<i>United States v. Hutcheson</i> , 312 U.S. 219....	37
<i>United States v. Socony-Vacuum Oil Co., Inc.</i> , 310 U.S. 150	30, 38
<i>Ziffirin Inc. v. Reeves</i> , 308 U.S. 132.....	15
<i>Zukaitis v. Fitzgerald</i> , 18 F. Supp. 1000.....	13

STATUTES:

California Constitution, Art. 22, Sec. 22 (Nov. 6, 1934)	32
Laws of California, Ch. 330, L. 1935, Amd. Ch. 758, L. 1937, Sec. 38(e), Sec. 555(a).....	31, 32
Collier Act, 49 Stat. 877, 27 U.S.C.A. Sec. 122.	21
Federal Alcohol Administration Act. 49 Stat. 977, 27 U.S.C.A. Sec. 201, et seq.....	9, 21
Federal Trade Commission Act. 49 Stat. 1527, 15 U.S.C.A. Sec. 41	21, 27
Interstate Commerce Act, 48 Stat. 219, 49 U.S.C.A. Sec. 5	27
Liquor Enforcement Act of 1936, 49 Stat. 1928, 27 U.S.C.A. Secs. 21-28	10, 21, 24
Robinson-Patman Act. 49 Stat. 1527, 15 U.S.C.A. Sec. 21(a)	26, 30
Securities Act of 1933, 48 Stat. 74, 15 U.S.C.A. Sec. 77	21
Sherman Act. 26 Stat. 209, 15 U.S.C.A. Secs. 1, 3	2
United States Constitution, Amendment XXI.	6, 8
Webb-Kenyon Act, Act of March 1, 1913, c. 90, 37 Stat. 699, 27 U.S.C.A. Sec. 122.....	18, 24
Wilson Act, 26 Stat. 313 27 U.S.C.A. Sec. 121	34

MISCELLANEOUS:

Anno. 110 A.L.R. 931, 941.....	20
27 Am. Jur. 668	36
76 Cong. Record, 1661, 4138, 4144, 4146, 4171, 4179	17

No. 10303

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

WASHINGTON BREWERS INSTITUTE, ET AL
Appellants,

VS.

UNITED STATES OF AMERICA,
Appellee,

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF FOR THE APPELLEE

STATEMENT

This appeal arises from an indictment returned in May 1941 by a Grand Jury sitting in the Western District of Washington, Northern Division. Named as defendants in the indictment were (1) twenty corporations engaged in the manufacture, distribution and sale of beer; (2) four incorporated associations,

each composed of certain of the aforesaid corporations; and (3) thirty-two individuals, described in the indictment as being officers of the defendant corporations and the defendant associations.

The indictment (R. 6) contains two counts, the first charging a violation of Section 1 of the Sherman Act (26 Stat. 209, 15 U.S.C.A. Sec. 1) and the second charging a violation of Section 3 of that Act (15 U.S.C.A. Sec. 3). All the defendants interposed demurrers to the indictment based upon the contention that the facts stated did not constitute a violation of the Sherman Act and that the indictment was vague, uncertain and indefinite (R. 38). The demurrers were overruled by the District Court (R. 52). Thereupon appellants entered pleas of *nolo contendere* as to both counts of the indictment, and fines were imposed upon them by the Court (R. 58-132). In this appeal, the action of the District Court in overruling the demurrers to the indictment is assigned as error (R. 138).

SUMMARY OF THE INDICTMENT

Paragraph 1 of the indictment (R. 6) is a jurisdictional allegation that the acts charged were committed within three years prior to the date of the filing of the indictment by the Grand Jury. Para-

graphs 2-8, inclusive, define various terms employed in setting forth the charge. Included among these definitions (Par. 8) is a description of the "Pacific Coast Area" as the territories comprised within the states of Washington, California, Idaho and Oregon.

Paragraphs 9-14 name and describe the defendants.

Paragraph 15 alleges and describes the nature and extent of the trade and commerce involved. The commerce described therein is the sale and shipment of beer "by breweries having plants located within each of the states comprising the Pacific Coast Area to importers and distributors of such beer doing business in each of the other states comprising the said Pacific Coast Area for distribution and consumption therein".

Paragraph 16 is the charging portion of the indictment. It is there alleged that the defendants engaged in a combination and conspiracy to fix and maintain uniform, artificial and non-competitive prices for beer in sales in interstate commerce, as described in Paragraph 15.

Paragraph 17 consists of a further description of the alleged combination and conspiracy and sets forth in detail the methods alleged to have been agreed

upon and used by the defendants to effectuate the combination and conspiracy to fix prices. It is there alleged that the defendants sold beer in interstate commerce at prices and upon terms and conditions of sale which were fixed and agreed upon, and granted only such refunds and allowances for bottles and containers as were fixed and agreed upon (subsecs. b, c, d. e); that they required wholesalers and retailers to adhere to the prices and terms and the conditions of sale so agreed upon, and refused to sell to such wholesalers and retailers who failed to adhere to such prices and terms and conditions (subsecs. g, m); that they induced beer manufacturers located outside of the Pacific Coast Area to sell beer at the prices so agreed upon, and to withhold beer from wholesalers and retailers in the Area who failed to adhere to such prices (subsecs. n, o); that they caused the liquor control boards in the various states of the Pacific Coast Area to adopt regulations requiring that the sales prices of beer within each state be reported to and posted with the liquor control board of that state, so that such regulations could be utilized to effectuate the combination and conspiracy, and that they utilized the defendant associations as a clearing house for their prices, with the result that the prices published and posted with the various

liquor control boards were uniform and agreed upon (subsecs. i, j, k, l); that they employed persons to police the beer markets in order to secure adherence to the prices so fixed and agreed upon (subsec. f); that they agreed to repurchase distress beer from distributors in order to prevent its sale at prices lower than those fixed and agreed upon (subsec. h); that they organized the defendant associations and utilized them for the dissemination of statistical data and information in order to assist in effectuating the combination to fix prices (subsecs. a, p).

Paragraph 18 of the indictment alleges that the purpose and effect of the acts alleged were to fix the prices, terms and conditions of sale of beer sold in interstate commerce in the Pacific Coast Area and to prevent breweries located in states outside of the Area from selling beer therein except in compliance with the terms and conditions determined, fixed, and agreed upon by the defendants.

Count 2 of the indictment is substantially the same as Count 1, except that:

1. It refers to and alleges that the combination to fix prices of beer related to sales from defendants, located in the United States, to purchasers in the territory of Alaska; and

2. The allegations of paragraph 17 concerning liquor control boards and administrator's zones and price postings are omitted.

CONTENTIONS MADE BY APPELLANTS

In sum, five contentions are made by appellants. They are:

1. That the Twenty-first Amendment to the Constitution of the United States has deprived the Federal Government of any and all power under the Commerce Clause of the Constitution over trade and commerce in intoxicating liquors, and thus the Sherman Act, because it is grounded upon the Commerce Clause, is not applicable to interstate commerce in beer, the subject of the indictment.
2. That the Sherman Act is not applicable to the commerce involved in the combination charged in the indictment because of certain state laws existing in the states of the Pacific Coast Area.
3. That the indictment does not allege facts showing that interstate commerce has been directly affected.

4. That the indictment is defective because it does not allege that the states of the Pacific Coast Area have not passed legislation authorizing or requiring price fixing in the sale and distribution of beer.
5. That the facts alleged disclose simply a combination to comply with state laws and that a combination having such purpose is not violating the Sherman Act.

Three separate briefs have been filed by appellants. ¹ The Ivers Brief asserts and relies upon contentions numbered 1 and 2 above; the Armstrong Brief appears to rely upon contentions numbered 2 and 3 above; the Eisner Brief asserts and relies upon contentions numbered 2, 3, 4, and 5 above.

¹ The brief filed by Attorneys R. M. J. Armstrong and Albert M. Compodonico, of San Francisco, for appellants Regal Amber Brewing Company and William P. Baker will be referred to herein as the "Armstrong Brief".

The brief filed by Attorney Norman A. Eisner, of San Francisco, for appellants Acme Breweries and Karl F. Schuster will be referred to herein as the "Eisner Brief".

The brief filed by Attorneys Lenihan and Ivers, of Seattle, in behalf of all other appellants will be referred to herein as the "Ivers Brief".

ARGUMENT

I. THE TWENTY-FIRST AMENDMENT DOES NOT DEPRIVE THE UNITED STATES OF THE POWER TO REGULATE INTERSTATE COMMERCE IN INTOXICATING LIQUOR WHEN SUCH COMMERCE IS CARRIED ON WITHOUT VIOLATION OF STATE LAWS.

A. THE UNITED STATES SUPREME COURT AND OTHER FEDERAL COURTS AFFIRM CONTINUING FEDERAL AUTHORITY OVER INTERSTATE COMMERCE IN LIQUOR.

Section 2 of the Twenty-first Amendment provides:

"The transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

The language of this Section does not apply in cases where transportation in intoxicating liquors is carried on without a violation of state laws. Had the framers of the Twenty-first Amendment intended to deprive Congress of power to regulate interstate commerce in liquors, the Amendment would most certainly have so stated. Instead, the application of the Amendment is expressly limited to "transportation or importation into any state . . . for delivery or use

therein . . . in violation of the laws thereof . . . ” It follows that the Commerce Clause, and acts passed thereunder, are applicable to commerce in liquors, except where their application would result in the transportation or importation of liquor into a state for use in violation of its laws.

This conclusion has been repeatedly approved and applied by the courts. *Arrow Distilleries, Inc. v. Alexander*, 109 F. (2d) 397 (C.C.A. 7, 1940), is a case in point. That case involved the Federal Alcohol Administration Act,² an act relating exclusively to intoxicating liquors and based on the Commerce Clause. Constitutionality of the Act was challenged, as in the case at bar, on the ground that the Twenty-first Amendment had divested the Federal Government of all jurisdiction over intoxicating liquors. The validity of the Act was upheld, the court speaking as follows (p. 400):

“ . . . there is no provision in the Amendment which purports to restrict the power of Congress over commerce in intoxicating liquors when such commerce is carried on without the violation of state laws, or to deny to Congress the power to legislate in aid of the state prohibitions.”

The Supreme Court denied certiorari (310 U.S.

² 49 Stat. 977, 27 U.S.C.A. Sec. 201, *et seq.*

646). Cf. *American Distilling Co. v. Wisconsin Liquor Co.*, 104 F. (2d) 582 (C.C.A. 7, 1939).

In the *Arrow Distilleries* case, *supra*, the Court relied upon the decision of the Supreme Court of the United States in *Wm. Jameson, Inc. v. Morgenthau*, 307 U.S. 171. The *Jameson* case also involved the Federal Alcohol Administration Act, arising from a petition seeking to compel the Secretary of the Treasury to release certain liquor from customs, although it was admitted that the manner of labeling the liquor was in violation of the Act. The Supreme Court spoke as follows (p. 172-173):

“Here, the Federal Alcohol Administration Act was attacked upon the ground that the Twenty-first Amendment to the Federal Constitution gives to the States complete and exclusive control over commerce in intoxicating liquors, unlimited by the commerce clause, and hence, that Congress has no longer authority to control the importation of these commodities into the United States. We see no substance in this contention.”

The continuing applicability of the commerce clause to transportation of intoxicating liquors was likewise affirmed in *Hayes v. United States*, 112 F. (2d) 417 (C.C.A. 10, 1940). That case involved the Liquor Enforcement Act of 1936, which prohibits the transportation of intoxicating liquor into any state in which sales of liquor are prohibited.³ The action

was brought by the United States for forfeiture of certain liquor held in violation of the provisions of the Act. The respondent contended that the Act was unconstitutional because the Commerce Clause had been rendered inapplicable to intoxicating liquors by reason of the Twenty-first Amendment. The Court rejected this argument, speaking as follows (p. 422):

“While the Twenty-first Amendment surrendered to each state the power to prohibit or condition the importation of intoxicating liquor in interstate commerce therein, we do not regard it as a surrender of the power of Congress to prohibit or regulate the transportation of intoxicating liquor in interstate commerce. The language of the Twenty-first Amendment is prohibitory in character. We entertain no doubt that the Congress has the power to enact legis-

³ 49 Stat. 1928, 27 U.S.C.A. Secs. 221-228. Section 223 of the Act reads as follows:

“(a) Whoever shall import, bring, or transport any intoxicating liquor into any State in which all sales (except for scientific, sacramental, medicinal, or mechanical purposes) of intoxicating liquor containing more than 4 per centum of alcohol by volume are prohibited, otherwise than in the course of continuous interstate transportation through such State, or attempt so to do, or assist in so doing, shall: (1) If such liquor is not accompanied by such permit or permits, license or licenses therefor as are now or hereafter required by the laws of such State; or (2) if all importation, bringing, or transportation of in-

lation to execute the Amendment and penalize its violation."

The following cases are in accord, each of them affirming the continuing applicability of the Commerce Clause to interstate shipments of intoxicating liquor. *United States v. Colorado Wholesale Wine and Liquor Dealers Association*, 47 F. Supp. 160 (D.C. Colo. 1942); *California State Brewers Institute, et al v. International Brotherhood of Teamsters, etc., et al* (W.D. Wash., N.D. Equity No. 1184). See also, *Gregg v. United States*, 113 F. (2d) 687 (C.C.A. 8, 1940); *Hastings v. United States*, 115 F. (2d) 216 (C.C.A. 8, 1940); *Flippin v. United States*, 121 F. (2d) 742 (C.C.A. 8, 1941); *Schlitz Brewing Company v. Johnson*, 123 F. (2d) 1016 (C.C.A. 6, 1941); *Sancho v. Corona Brewing Co.*, 89 F. (2d) 479

toxicating liquor into such State is prohibited by the laws thereof; be guilty of a misdemeanor and shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

"(b) In order to determine whether anyone importing, bringing, or transporting intoxicating liquor into any State, or anyone attempting so to do, or assisting in so doing, is acting in violation of the provisions of this chapter and sections 388-390 of Title 18, the definition of intoxicating liquor contained in the laws of such State shall be applied, but only to the extent that sales of such intoxicating liquor (except for scientific, sacramental, medicinal, and mechanical purposes) are prohibited in such State."

(C.C.A. 1, 1937); *Dugan v. Bridges*, 16 F. Supp. 694, 717 (D.C.N.H. 1936); *Zukaitis v. Fitzgerald*, 18 F. Supp. 1000 (D.C. Mich. 1936).

In the *Colorado Liquor Dealers Association* case, *supra*, the Court upheld an indictment which, like the indictment in the case at bar, charged a combination among distributors of liquor to fix selling prices in violation of the Sherman Act. The Court considered and rejected the contention that the Twenty-first Amendment had rendered the Sherman Act inapplicable.

In the *California State Brewers* case, *supra*, several of the appellants, who in the case at bar deny the applicability of the Sherman Act, therein sought the Act's protection. They, and certain other manufacturers and distributors of beer, filed a bill in equity seeking to restrain a labor union and certain of its members from engaging in activities alleged by plaintiffs to be in restraint of their interstate commerce in beer. The case was heard by Judge Cushman and the injunction was granted. The Court filed conclusions of law, including a declaration that:

“The Twenty-first Amendment to the Constitution of the United States of America has not removed plaintiff's trade from the protection of the Antitrust Act.”

In the *Schlitz Brewing Company* case, *supra*, the

Circuit Court of Appeals for the Sixth Circuit upheld a complaint alleging a combination in restraint of trade and asking treble damages. Although the defendants contended that no restraint upon interstate commerce was alleged, they did not urge that the Twenty-first Amendment had removed intoxicating liquors from Federal jurisdiction under the Commerce Clause. Obviously, however, the decision of the Circuit Court was grounded upon the continuing applicability of that clause to commerce in liquors.

The cases relied upon by appellants (Ivers Brief, pp. 18-24) do not support the contention that the Twenty-first Amendment repealed the application of the Commerce Clause to intoxicating liquors. In the case of *State Board of Equalization v. Young's Market*, 299 U.S. 59 (Ivers Brief, p. 19) it was held that the State of California might properly enact a statute imposing a license fee for the privilege of importing beer into the State. The Supreme Court declared that since, under the Twenty-first Amendment a State could absolutely prohibit the importation of beer, it could also permit such importation under the conditions involved. In *Indianapolis Brewing Co. v. Liquor Control Commission*, 305 U.S. 391, and in *Joseph S. Finch & Co. v. McKittrick*, 305 U.S. 395 (Ivers Brief, p. 21) it was held that a state might prohibit the im-

portation of liquor from States which discriminated against its liquor products. In *Ziffrin, Inc. v. Reeves*, 308 U. S. 132 (Ivers Brief, p. 23) it was held that a state could require the licensing of common carriers engaged in transportation of liquor into or out of the state. The Court held that since it was within the power of the state to prohibit the manufacture of transportation of intoxicants the state might "adopt measures reasonably appropriate to effectuate these inhibitions and exercise full police authority in respect to them . . ." (p. 138). In *Mahoney v. Triner Corp.*, 305 U.S. 401 (Ivers Brief, p. 20) it was held that a state could prohibit the importation of liquor which did not bear a label registered in the Patent Office of the United States. Cf. *Duckworth v. Arkansas*, 314 U.S. 390.

All of the above cases arose from efforts to transport liquor into states in clear violation of state laws. Since, by the plain language of the Amendment, such transportation is prohibited, the validity of the state laws could not be denied by resort to the Commerce Clause. These cases do not hold, either expressly or by implication, that the Commerce Clause is inapplicable in cases where transportation of intoxicating liquors is carried on without a conflict with state legislation.

B. LEGISLATIVE HISTORY OF THE TWENTY-FIRST AMENDMENT INDICATES INTENT TO PRESERVE FEDERAL AUTHORITY OVER INTERSTATE COMMERCE IN LIQUOR.

It is urged by appellants (Ivers Brief, pp. 13-16) that the legislative history of the Amendment indicates that it was the intention of the framers to revoke the Commerce Clause of the Constitution insofar as intoxicating liquors are concerned. In support of this contention, appellants rely upon certain remarks made by individual Senators in the course of debates on the proposed Amendment. However, the plain language of the Amendment is more persuasive than isolated remarks made during the Senate debate. The rule is well established that where language is clear and unambiguous, it is controlling, without regard to expressions of opinion or attitudes of individual legislators made in the course of debate.⁴

Moreover, an examination of the legislative history of the Amendment fails to indicate that the purpose of the framers was to divest the Federal Government of jurisdiction under the Commerce Clause.

Much of the debate on the floor of the Senate related to a proposed section which was not included in the Amendment as submitted to the states for ratification. This section would have given Congress

⁴ *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213.

“concurrent power to regulate or prohibit the sale of intoxicating liquor to be drunk where sold.” (76 Cong. Rec. 1661). Serious opposition to this section was expressed principally because its operation would constitute an intrusion on the part of the Federal Government into purely local affairs of the states; and it was suggested that for this reason the proposed Amendment represented no improvement over the existing Eighteenth Amendment. One of the weaknesses of national prohibition was the fact that “it attempted to impose a single standard of conduct upon all the people of the United States without regard to local sentiment and local habits”. (76 Cong. Rec. p. 4146) These views were repeatedly expressed from the floor of the Senate (76 Cong. Rec., pp 4138-4179) and clearly appear to have been the most prevalent grounds for the objection to the proposed Subsection 3. As was said by Senator Wagner in the course of debate:

“It was a question of government; how to restore the constitutional balance of power in our Federal system which had been upset by national prohibition.” (76 Cong. Rec. 4144)

The framers of the Amendment thus appear to have assumed the continued applicability of the Commerce Clause to intoxicating liquors. What they were concerned with was where to strike “the balance of

power” between state authority and federal authority.

The most significant thing about the debates on the floor of the Senate is that they reflect an intent to attain, by Section 2 of the Amendment, the same end that was sought by the enactment of the Webb-Kenyon Act.⁵ Prior to the passage of that Act, liquor transported in interstate commerce was protected by the Commerce Clause, and the prohibition states were thus unable to enforce adequately laws relating to liquor sale and distribution, when such laws prevented the free movement of liquor in interstate commerce. *Leisey v. Hardin*, 135 U.S. 100. The Webb-Kenyon Act gave effect to state liquor legislation by prohibiting the shipment or transportation of intoxicating liquors into any state for use in violation of state laws.⁶

⁵ Act of March 1, 1913, c. 90, 37 Stat. 699, 27 U.S.C.A. Sec. 122.

⁶ The Webb-Kenyon Act reads as follows:

“The shipment or transportation, in any manner or by any means whatsoever, of any spiritous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any for-

The Twenty-first Amendment "so clearly follows the Webb-Kenyon Act as to lead to the conclusion that it was copied therefrom and that it should receive the same construction as that given the last mentioned Act." *Dugan v. Bridges* 16 F. Supp. 694, 706 (D.C. N.H. 1936). See, also, 76 Cong. Rec. 4171.

In *Adams Express Company v. Kentucky*, 238 U.S. 190, it was held that the Webb-Kenyon Act did not prohibit the transportation of liquor into the State of Kentucky where the liquor was not to be used in violation of the laws of that State. The Supreme Court declared that the Act "did not assume to deal with all interstate commerce shipments of intoxicating liquor . . .", but that it related only to transportation of liquor in cases in which it was "to be dealt with in violation of the local law of the State" into which shipment is made. (238 U.S. 190, 198.) See,

eign country into any State, Territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited. (Mar. 1, 1913, C. 90, 37 Stat. 699; Aug. 27, 1935, c. 740§ 202 (b) 49 Stat. 877).

also, *United States v. Colorado Wholesale Wine and Liquor Dealers Association*, 47 F. Supp. 160, 163 (D.C. Colo., 1942) Anno., 110 A.L.R. 931, 941. This construction of the Webb-Kenyon Act was fully established at the time of the drafting of the Twenty-first Amendment. It follows that the Congress which saw fit to adopt language closely following the language of the Webb-Kenyon Act, intended to adopt the contemporary construction of that Act as the true intendment of the Twenty-first Amendment.

The legislative history of the Twenty-first Amendment thus clearly indicates an intent to preserve Federal authority over interstate commerce in liquor.

If appellants' contention — that the Federal Government no longer has any jurisdiction over commerce in liquors — is accepted, it would mean that there is now *no governmental control*, either state or Federal, over commerce in liquors except where laws prohibiting or conditioning the importation of liquors have been enacted by state legislatures. All Federal laws based on the Commerce Clause which relate to

intoxicating liquors would have to be held unconstitutional, including the Federal Alcohol Administration Act,⁷ the Collier Act,⁸ and the Liquor Enforcement Act of 1936.⁹ Appellants' contention would require the overruling of United States Supreme Court and other Federal decisions which uphold the validity of these laws.

Likewise, acceptance of appellants' view would mean that the Federal Trade Commission Act,¹⁰ and the Securities Act of 1933,¹¹ depending for their validity on the Commerce Clause, must be held inapplicable to the vast and complicated liquor industry.

It is submitted that such consequences are not

⁷ 49 Stat. 977, 27 U.S.C.A. Sec. 201 *et seq.*

⁸ The Collier Act was a re-enactment of the Webb-Kenyon Act. 49 Stat. 877, 27 U.S.C.A. Sec. 122.

⁹ 49 Stat. 1928, 27 U.S.C.A. Sec. 221 *et seq.* The passage of such legislation, after the adoption of the Twenty-first Amendment, is a strong indication that the Amendment was not intended to divest the Federal Government of jurisdiction over liquors. *Myers v. United States*, 272 U. S. 52; *United States v. Moore*, 95 U. S. 760; *Williams v. United States*, 289 U. S. 553; *Levin v. United States*, 128 Fed. 826.

¹⁰ 49 Stat. 1527, 15 U.S.C.A. Sec. 41.

¹¹ 48 Stat. 74, 15 U.S.C.A. Sec. 77. This Act was enacted approximately four months after the adoption of the Joint Resolution calling for the Twenty-first Amendment, but no exemption was made in favor of firms or corporations engaged in the liquor industry.

warranted by the language of the Twenty-first Amendment. The language of the Amendment has no application whatsoever to commerce in liquor where such commerce is carried on without a violation of state laws; and in such cases the Commerce Clause, and laws based thereon, are applicable. This interpretation of the Amendment is supported by the decided cases. Furthermore, even where the transportation of intoxicating liquors is carried on in violation of state laws, Congress may enact legislation, such as the Webb-Kenyon Act and the Liquor Enforcement Act of 1936, which is in aid of the state prohibitions. Appellants' contention that the Twenty-first Amendment divested the Federal Government of jurisdiction over intoxicating liquors is, therefore, totally without merit.

II. THE LAWS OF THE STATES OF THE PACIFIC COAST AREA DO NOT AFFECT THE APPLICABILITY OF THE SHERMAN ACT IN THE INSTANT CASE.

A. STATE LEGISLATION RELATING IN A GENERAL WAY TO LIQUOR DISTRIBUTION DOES NOT DIVEST THE FEDERAL GOVERNMENT OF JURISDICTION OVER INTERSTATE COMMERCE IN INTOXICATING LIQUORS.

Appellants contend that upon the enactment by the states of the Pacific Coast Area of "general" legislation concerning the distribution of intoxicating

liquors, the Federal Government was thereupon divested of all jurisdiction, under the Commerce Clause, over commerce in liquors. To support this contention, appellants argue (Ivers Brief, p. 32, et seq.) that the Twenty-first Amendment is an "offer" to the states which, when acted upon, automatically withdraws the application of the Commerce Clause as to intoxicating liquors.

It is not necessary to go beyond the *Jameson Case*, *supra*,¹² to defeat this contention. In that case, the Government sought to exercise jurisdiction over the importation of liquor into the State of New York, where comprehensive state legislation relating to liquor had been enacted. The Supreme Court said it saw "no substance" to the contention that the Amendment had divested the Federal Government of its power to regulate commerce in liquor (307 U. S. 171, 173).

In the *Arrow Distilleries Case*, *supra*,¹³ the applicability of the Federal Alcohol Administration Act was upheld, although the liquor involved in the proceedings was "to be used in violation of the laws of Iowa". (p. 403.)

In the *Colorado Liquor Dealers Case*, *supra*,¹⁴ the

¹² 307 U. S. 171, 173.

Sherman Act was held applicable to the interstate shipments of liquor into the State of Colorado, although that State had passed legislation relating to intoxicants. The same Act was held applicable in the *California State Brewers Case*, *supra*,¹⁵ to shipments into the State of Washington, although the state legislation relied upon the appellants herein had already been enacted. See also *Schlitz Brewing Company v. Johnson*, 123 F. (2d) 1016 (C.C.A. 6, 1941).

The Webb-Kenyon Act¹⁶ and the Liquor Enforcement Act of 1936¹⁷ are based on the Commerce Clause of the Constitution and *depend for their applicability upon the existence of state legislation*. *Hayes v. United States*, 112 F. (2d) 417 (C.C.A. 10, 1940). Obviously, a decision to the effect that Federal jurisdiction over commerce in liquor is automatically withdrawn by the enactment of state liquor legislation would amount to a denial of the constitutionality of these acts.

¹³ 109 F. (2d) 397 (C.C.A. 7, 1940), c.d. 310 U. S. 646.

¹⁴ 47 Fed. Supp. 160 (D.C. Colo 1942).

¹⁵ W.D. Wash., N.D., Equity No. 1184.

¹⁶ 49 Stat. 877, 27 U.S.C.A. Sec. 122.

¹⁷ 49 Stat. 1928, 27 U.S.C.A. Sec. 224.

The Armstrong Brief and the Eisner Brief support the contention that general state legislation divests the Federal Government of jurisdiction over intoxicating liquors by citation of a number of cases which hold simply that the Commerce Clause does not afford protection to liquor which is sought to be transported into a state in violation of its laws. (Armstrong Brief, pp. 28-36; Eisner Brief, pp. 9-15) Such cases, it is submitted, furnish no support whatsoever for the proposition that the Commerce Clause is inapplicable to commerce in intoxicating liquors which is carried on without violation of state laws.

In the Ivers Brief (pp. 34-37) it is argued that the Twenty-first Amendment is an affirmative grant of power to the states, and that any jurisdiction over commerce in intoxicating liquors which remains in the Federal Government is an implied power, which is removed upon the enactment by states of general liquor laws. This argument is based on several assumptions, none of which are correct. Neither the Eighteenth Amendment nor the Twenty-first Amendment divested the Federal Government of jurisdiction over interstate commerce in liquors, and such jurisdiction is based directly on the Commerce Clause. *United States v. Hill*, 248 U.S. 420; *Wm. Jameson, Inc. v. Morgenthau*, 307 U.S. 171. Furthermore, the Twen-

ty-first Amendment did not constitute an affirmative grant of power to the states. State power over intoxicating liquors is derived from the fundamental police power of the states. *Sancho v. Corona Brewing Corp.*, 89 F. (2d) 479 (C.C.A. 1, 1937), c.d. 302 U.S. 699; Cf. *Bacardi Corp. v. Domenech*, 311 U.S. 150. The Twenty-first Amendment is "prohibitory in character" and was not a "surrender of the power of Congress to prohibit or regulate the transportation of in-intoxicating liquor in interstate commerce". *Hayes v. United States*, 112 F. (2d) 417, 422 (C.C.A. 10, 1940).

In the Ivers Brief it is apparently recognized that Federal laws based on the Commerce Clause are applicable to commerce in intoxicating liquors in cases where their application would not result in the transportation of liquor into a state in violation of its laws — for the brief argues at some length that the *philosophy* of the Sherman Act is in conflict with that of state liquor laws (Ivers Brief, p. 39).

The state laws relied upon by appellants in this connection do no more than prohibit certain *types* of competition. They prohibit price discrimination, they regulate advertising, and they require that beer prices be posted with state agencies. In the field of Federal

¹⁸ 49 Stat. 1527, 15 U.S.C.A. Sec. 21(a).

discrimination; the Federal Trade Commission Act¹⁹ regulates advertising; and the Interstate Commerce Act²⁰ requires railroads to publish their rates with the Interstate Commerce Commission. While some economic theorists might argue that the philosophy of these acts is in conflict with that of the Sherman Act, such conflict, if it exists, is certainly not grounds for repealing the Sherman Act. The fact is that the Sherman Act is itself a regulatory enactment, declaring that distribution of commodities shall be in accordance with competitive principles. Certainly, however, the existence of statutes which eliminate certain abuses in the competitive system cannot be held to have repealed the Sherman Act. Appellants' argument assumes that there can be no such thing as a form of regulated competition. Yet such a scheme of distribution has existed in this country for many years. There is no conflict between any state law relied upon by appellants and the Sherman Act which requires that one must fall before the other.

A further answer to appellants' argument is to be found in the Armstrong Brief, where it is pointed out (p. 38) that all the states in the Area have "adopted laws against restraint of trade and commerce"
legislation the Robinson-Patman Act¹⁸ prohibits price

¹⁹ 38 Stat. 719, 15 U.S.C.A. Secs. 41, 44.

²⁰ 48 Stat. 219, 49 U.S.C.A. Sec. 5.

which are applicable to the distribution of beer. In other words, the state laws require competition. Thus, there is no conflict, even in economic philosophy, between the Sherman Act and state legislation relating to beer.

It is submitted that the so-called "general" liquor legislation enacted by the states of the Pacific Coast Area has in no way affected the applicability of the Sherman Act.

B. COMPLIANCE WITH THE SHERMAN ACT IN
THE DISTRIBUTION OF BEER IN THE PACIFIC
COAST AREA WOULD NOT VIOLATE ANY LAW
OF ANY STATE IN THE AREA.

Appellants, apparently recognizing the weakness of the argument that "general" legislation by the state impairs the applicability of the Sherman Act, go one step further and argue that the four states of the Area have enacted legislation which "specifically" deals with the acts alleged in the indictment (Ivers Brief, p. 40). They argue that each of the states involved "has enacted, by legislative act or regulation pursuant thereto, provisions controlling prices, the fixing of prices . . . and other matters relative thereto" (Ivers Brief, p. 40). It is declared that the Washington State Liquor Control Board "has defined and

established zones for the purpose of fixing and establishing prices . . .” (Ivers Brief, pp. 40-41).

Surely appellants do not mean by this that the State of Washington or its Liquor Control Board fixes or controls the sales price of beer. There is no law or regulation in that state or in any other state of the Area which has this purpose or effect. Furthermore, there is no law or regulation operative in any of the four states of the Area which permits, authorizes, or requires beer distributors to engage in joint price agreements.

Appellants point out that regulations in each of the states of the Area provide that each brewer and importer must publish and file its selling price with the state agency in which sales of this beer are to be made, and that they must adhere to the price so filed (Ivers Brief, p. 40-41). Such requirements do not, by any possible interpretation, authorize distributors to agree on the prices to be filed thereunder.²¹

Appellants likewise point to the regulations which prohibit a brewer from making price discriminations between purchasers located in common trade areas. Such regulation has a purpose similar to the

²¹ The requirement that railroads must publish a list of their rates with the Interstate Commerce Commission does not authorize inter-company price agreements. *Keogh v. Chi. N. W. Ry.*, 260 U.S. 156.

provisions of the Federal Act which prohibits price discriminations in sales in interstate commerce.²² Obviously, neither these state regulations nor the provisions of the Federal Act were intended to permit agreements among competitors to fix selling prices. Likewise, regulations prohibiting price discriminations among purchasers of a common "classification" do not permit agreements among distributors upon the price to be charged the members of such classification (Ivers Brief, pp. 43-44).

The fact that a manufacturer is permitted to fix the price at which purchasers from him may resell a product does not permit a group of manufacturers to agree upon the price at which all purchasers from them are to make resales (Ivers Brief, pp. 44-45). The fact that a certain procedure is to be followed in connection with the purchase by a manufacturer of a distress product does not permit agreement among the competitors to withdraw a portion of the commodity from the market in order to fix or stabilize prices. *United States v. Socony-Vacuum Oil Co., Inc.*, 310 U. S. 150 (Ivers Brief, pp. 45-46). Similarly, the fact that manufacturers located outside of a state must obtain a certificate in order to do business within that state does not permit such a manufacturer to

²² 49 Stat. 1527, 15 U.S.C.A. Sec. 21(a).

engage with its local competitors in price-fixing combinations (Ivers Brief, pp. 46-47).

It is apparent that appellants can point to no state legislation or regulation which requires or authorizes beer distributors to combine to fix the prices at which beer will be sold. Appellants certainly cannot contend that they would have violated a single state law or regulation if they had *not* engaged in the price-fixing combination alleged in the indictment. This fact alone confirms the validity of this indictment. It is true that certain of the steps, or the means, which the appellants adopted to fix and stabilize beer prices were authorized or required by state law or regulation; but if, as alleged, these steps are part of a plan adopted by appellants to fix and stabilize prices, the fact that the steps themselves are lawful does not alter the illegality of the plan. *Swift & Co. v. United States*, 196 U.S. 375, 396.

The fact is that the laws of the states concerned contemplate competition in the distribution of beer. The California liquor law speaks of "competing prices"²³ and of a "beverage which is in fair and open competition with alcoholic beverages of the same gen-

²³ Calif., Ch. 330, L. 1935, amd. Ch. 758, L. 1937, Sec. 38(e).

eral class".²⁴ Likewise, the California State Constitution, in defining its powers over liquor, specifically states that they are "subject to the laws of the United States regulating commerce between foreign nations and among the states".²⁵

Similarly, the fact that the state regulations require that prices be published with state agencies a certain number of days before they are to become effective indicates that price competition is expected. If the state laws and regulations intended that beer manufacturers should agree upon the prices to be posted, there would be no purpose in establishing a hiatus between the time of filing prices and the time they are to be effective.

No law or regulation of any state in the Pacific Coast Area requires, permits, authorizes, or condones a combination among distributors of beer to fix selling prices. In fact, such combinations would be in violation of the state laws prohibiting restraints of trade. Since distribution of beer in the Pacific Coast Area at competitive prices would not violate any law or regulation of any state in the Area, and since distribution in such manner is therefore not prohibited

²⁴ Calif. Ch. 330 L. 1935, amd. Ch. 758, L. 1937, Sec. 555(a).

²⁵ Calif. Const. Art. 22, Sec. 22 (Nov. 6, 1934).

by the Twenty-first Amendment, it follows that the Sherman Act is applicable in the case at bar.

III. THE INDICTMENT SUFFICIENTLY ALLEGES A RESTRAINT WHICH DIRECTLY AFFECTS INTERSTATE COMMERCE.

Appellants contend that distribution of beer in the Pacific Coast States "under the facts alleged in the indictment . . . would constitute a violation of the Webb-Kenyon Act . . ." (Armstrong Brief, p. 39). Appellants therefore conclude that the indictment does not allege a restraint of interstate commerce. Presumably, their reasoning is that the distribution of beer at prices which are fixed by agreement violates the provisions of the state laws prohibiting restraints of trade; and that since distribution of liquor in violation of state laws is prohibited by the Webb-Kenyon Act, such distribution does not constitute interstate commerce.

This argument rests on a curious inconsistency. It is founded on the Webb-Kenyon Act and yet that Act is itself based on the Commerce Clause and, by its very terms, is applicable only in cases where liquor is transported into a state for distribution in violation of state laws. *Adams Express Co. v. Kentucky*, 238 U.S. 190. The very application of the Webb-Kenyon Act establishes that Congress is not divested of jurisdiction over liquors simply because of the fact

that they may be in the course of transportation into a state for distribution in violation of state laws. While the Commerce Clause may not be resorted to protect liquor transportation into a state in violation of state laws, nevertheless, Congress retains power under the Commerce Clause "to legislate in aid of state prohibitions." *Arrow Distilleries, Inc. v. Alexander*, 109 F. (2d) 397, 400 (C.C.A. 7, 1940); *United States v. Hill*, 248 U.S. 420. Appellants' argument amounts to nothing more than an admission that they have violated the Webb-Kenyon Act as well as the Sherman Act; and since the Webb-Kenyon Act rests upon the applicability of the Commerce Clause, it can hardly be said that this Act can afford grounds for denying the existence of interstate commerce under the facts alleged in the indictment.

Appellants likewise contend that the indictment does not allege a restraint upon interstate commerce because of the application of the Wilson Act.²⁶ (Armstrong Brief, p. 40). The Wilson Act, however, does not, either by its terms or by its application, divest

²⁶ 26 Stat. 313, 27 U.S.C.A. Sec. 121. The Act reads:

"All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the

intoxicating liquors of their interstate character, at any point in the flow of commerce. No act of Congress could do this. All that the Wilson Act does is provide that at a certain point state laws respecting liquor shall become applicable. It does not deny the applicability of Federal laws which are not in conflict with state laws.

But even if the Wilson Act did purport to render intrastate that which in fact is interstate, appellants' contention would be without merit, for the Wilson Act is not applicable to the facts charged in the indictment. The indictment alleges that the defendants combined to fix prices in sales from manufacturers located in one state to purchasers located in another (Indictment, par. 15). The Wilson Act is not applicable to such commerce. It is applicable only after the goods have reached the consignee in the state of destination. It is *not* applicable while the goods are in the course of transportation or shipment from one state to another. *In re Rahrer*, 140 U.S. 545; *Rhodes v. Iowa*, 170 U.S. 412. Furthermore, even if the subject matter of the indictment had

laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

reached the state of destination, and the interstate flow had ceased, this would furnish no grounds for challenging the indictment, for a determination of the point where interstate commerce ends is not essential in determining whether interstate commerce is affected within the meaning of the Sherman Act. *Local 167 v. United States*, 291 U.S. 293, 297; *United States v. General Motors Corp.*, 121 F. (2d) 376, 398, 401, 402 (C.C.A. 7, 1941).

Clearly, the indictment alleges facts amounting to a restraint upon interstate commerce in beer.

IV. THE INDICTMENT NEED NOT ALLEGE THE ABSENCE OF STATE LAWS WHICH MIGHT BE SET UP BY WAY OF DEFENSE.

It is contended by appellants that the indictment is defective because it does not allege that "the acts complained of are not authorized or required by state laws." (Eisner Brief, p. 18).

The indictment need not contain any such allegation. The law in this respect is stated in 27 Am. Jur. 668, as follows:

"Nor is an indictment which clearly and accurately describes every ingredient of an offense defined by a statute which contains no exception or proviso defective or insufficient for want of averments in negation of the provisions of another statute which may be set up defensively

or of an exception in the latter statute.”

The above rule was applied by the Supreme Court in the case of *United States v. Hutcheson*, 312 U.S. 219. In that case the defendants were indicted for a violation of the Sherman Act, and contended, on demurrer, that the acts alleged in the indictment did not constitute an offense under the Sherman Act by reason of certain provisions contained in the Norris-LaGuardia Act. The indictment did not negate the existence of the Norris-LaGuardia Act. The Supreme Court held that it could properly consider the Norris-LaGuardia Act in determining whether or not the facts alleged in the indictment constituted a violation of the Sherman Act, or any other Act, saying (p. 229):

“In order to determine whether an indictment charges an offense against the United States, designation by the pleader of the statute under which he purported to lay the charge is immaterial. He may have conceived the charge under one statute which would not sustain the indictment but it may nevertheless come within the terms of another statute. See *Williams v. United States*, 168 U.S. 382. On the other hand, an indictment may validly satisfy the statute under which the pleader proceeded, but other statutes not referred to by him may draw the sting of criminality from the allegations.”

Obviously, if the prosecution in this case were required to allege the absence of state laws, it would

be necessary to prove such absence. The manner of proving the absence of such a state law would indeed be interesting.

It is submitted that the indictment contains all necessary allegations.

V. THE INDICTMENT CHARGES A VIOLATION OF THE SHERMAN ACT AND NOT SIMPLY A COMBINATION TO COMPLY WITH STATE LAWS.

It is contended in the Eisner Brief (p. 29) that the indictment does not charge a violation of the Sherman Act because all that is alleged is a combination "the object and purpose of which is compliance with state laws and regulations . . .".

The indictment charges a combination among distributors of beer to fix the prices at which they will sell this commodity. Such a combination is a violation of the Sherman Act *per se.* *United States v. Seagram-McCormack Oil Co.*, 316 U.S. 150. No qualification of this rule can exist in the case at bar, because the liquor laws of the states of the Pacific Coast Area neither require, permit, authorize, or condone combinations to fix distribution prices of beer. The fact is, as is pointed out in the Armstrong Brief (pp. 39-40), that the state laws prohibiting restraint of trade require that distributions of beer shall be in

accordance with the principles of competition. Little support, therefore, can be found in the state legislation for the argument that the purpose and object of the alleged combination was to comply with state laws.

The fact that some of the steps utilized by appellants to effectuate the object of the combination and conspiracy are legal, cannot, of course, afford any grounds for challenging the validity of the indictment. *Swift & Co. v. United States*, 196 U.S. 375.

VI. COUNT TWO OF THE INDICTMENT ADEQUATELY ALLEGES A VIOLATION OF SECTION THREE OF THE SHERMAN ACT.

Count Two of the indictment alleges that the defendants named in the indictment combined to fix the prices of beer in sales from manufacturers located in states of the United States to purchasers located in the Territory of Alaska.

The argument made heretofore, with respect to Count One of the indictment, applies equally to the allegations of Count Two. The Territory of Alaska has enacted no laws and promulgated no regulations which require, permit, or authorize distributors located in the states of the United States to agree among themselves with respect to prices of beer sold to purchasers in the Territory of Alaska. The distribu-

tion of beer in compliance with the provisions of the Sherman Act is not therefore prohibited, and the Twenty-first Amendment to the Constitution has no application. Furthermore, the laws of the Territory of Alaska do not relate either "generally" or "specifically" to the facts alleged in the indictment which constitute the charge. No argument can be made to the effect that the Territory of Alaska has pre-empted the field of liquor legislation, if it be assumed that such argument affords valid ground for challenging the indictment in the case at bar.

CONCLUSION

It is submitted that the foregoing authorities adequately establish that the Twenty-first Amendment did not divest the Federal Government of jurisdiction over intoxicating liquors under the Commerce Clause. The Twenty-first Amendment is prohibitory only. Its only effect upon the Commerce Clause is that it prohibits resort to that clause for protection of transportation of liquor into a state in violation of state laws. In other cases, the Commerce Clause, and laws based thereon, are applicable. Congress has the power, with respect to liquor, to enact legislation in aid of state laws and legislation which does not conflict with state laws respecting the use or distribution of liquor.

No state in the Pacific Coast Area, nor the Territory of Alaska, requires, authorizes, or permits distributors of beer to engage in combinations to fix and agree upon the selling prices of beer. Consequently, the distribution and sale of beer in the Pacific Coast Area and in Alaska in compliance with the provisions of the Sherman Act does not violate any law of any state in the Area, or any law of the Territory of Alaska. The Twenty-first Amendment is therefore inapplicable, and the applicability of the

Commerce Clause and the Sherman Act are unqualified.

This conclusion is supported by the fact that the four states of the Area have laws prohibiting restraints of trade which require that beer be distributed at prices which are fixed by competition. Instead of being in conflict with state legislation, as some of appellants would imply, the Sherman Act is actually in aid of state legislation.

It is therefore submitted that the demurrers to the indictment were properly overruled, both as to Count One and as to Count Two.

Respectfully submitted,

CHARLES S. BURDELL
*Special Assistant to the
Attorney General*

JOHN S. HARLOW
ROBERT McFADDEN
ALLAN TRUMBULL
*Special Attorneys,
Department of Justice*

TOM C. CLARK
Acting Assistant

J. CHARLES DENNIS
*United States Attorney
Attorney General*